

PROGRAMMERS EX PARTE SUBMISSION

ORIGINAL

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September 4, 2002

BY HAND

RECEIVED

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

SEP - 4 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Written Ex Parte Submission in CS Docket No. 98-120

Dear Ms. Dortch:

International Cable Channels Partnership, Ltd. ("International Channel Networks"), The Outdoor Channel, Inc. ("Outdoor Channel"), and Starz Encore Group LLC ("Starz Encore") (collectively "Programmers") are concerned that, according to reports in the trade press, the Commission is considering reversing course and granting expanded must-carry rights to broadcasters for all of their digital multicast channels. The Programmers respectfully submit that such reversal not only is contrary to the statutory language as interpreted by the Commission but also is unjustified by any compelling public interest. The Programmers ask the Commission to adopt rules that will ensure a fair opportunity for all programmers to compete for distribution and viewers.

The Programmers Seek Only a Fair Opportunity to Distribute Their Diverse Programming.

The Programmers provide the very kind of diverse programming which the Commission has sought to foster in this and other proceedings, including niche programming and programming targeted at underserved ethnic audiences:

International Channel Networks: Its basic service "International Channel" provides programming to disparate ethnic groups in over twenty languages, including multiple Asian, European and Middle Eastern languages, such as Arabic, Cambodian, Cantonese, Farsi (Persian), French, German, Greek, Hindi, Hmong, Hungarian, Italian, Japanese, Korean, Mandarin, Polish,

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Portuguese, Punjabi, Romanian, Russian, Spanish, Swedish, Tagalog (Filipino), Thai, and Vietnamese. In addition, International Channel Networks markets twelve "International Premium Networks" - ART (Arabic), RAI (Italian), RTN (Russian), TV JAPAN, SBN (Vietnamese), The Filipino Channel, Zhong Tian Channel (Chinese - Taiwan), CCTV-4 (Chinese - mainland), Zee TV (South Asian), TV Asia (South Asian), MBC (Korean), and TV5 (French). International Channel Networks also markets the Canales ñ package of nine Spanish-language video channels and eight Latino audio channels, which carry the programming of many of the world's top Spanish-language digital video and audio cable channels;

Outdoor Channel: "Outdoor Channel" consists of programming focusing on the traditional outdoor life-styles of fishing, hunting, camping and other similar outdoor activities; and

Starz Encore: "Encore"; "STARZ!"; thematic multiplex channels of "Westerns," "Love Stories," "Mystery," "Action," "True Stories," and "WAM!"; "MOVIEplex"; "STARZ! Theater"; "BLACK STARZ!"; "STARZ! Family"; and "STARZ! Cinema" primarily are programmed with recent and library theatrical movies. BLACK STARZ! is the only commercial-free movie channel directed at the African-American community. Starz Encore also has launched "Starz On Demand" as an innovative subscription video-on-demand programming service.

The Programmers are considering the launch of additional programming services to expand their offerings and to utilize more fully their programming resources.

None of the Programmers has universal carriage among cable and DBS operators for any - much less all - of their programming services. Each is constantly attempting to market its programming service(s) to expand its distribution. Even if they already have agreements with cable multiple system operators ("MSOs"),<sup>1</sup> each of the Programmers has full-time staff who are constantly calling upon individual system managers to sell the programming services and obtain new launches or deeper distribution through retiering. The Programmers compete with other programming services on the basis of content, ratings, license fees, launch support, advertising avails, and/or a variety of other commercial factors. Contract negotiations with cable MSOs and DBS operators often are extended and demanding.

In this competitive context, the Programmers object to the expansion of preferential must-carry status to any and all "free" channels offered by broadcasters. There is neither unlimited capacity by cable and DBS operators to carry programming services nor insatiable demand by viewers for such services. The Programmers clearly have been competitively disadvantaged by the existing must-carry law and rules. Cable operators have informed each of the Programmers on multiple occasions that they cannot distribute programming services on highly-penetrated, desirable analog tiers in systems because there is no

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<sup>1</sup> Such agreements often are "hunting licenses" that permit systems to distribute a programming service but do not require distribution.

channel capacity – a problem caused in no small part by the carriage of multiple must-carry broadcast stations. Cable operators have deleted programming services directly as the result of Commission decisions granting must-carry status. For example, International Channel was deleted from Time Warner's Manhattan system, which is particularly important because of the strong ethnic diversity and potential exposure to numerous and important advertisers, in order to carry WMBC-TV (Ch. 63-Newton, NJ) throughout the New York ADI. See Memorandum Opinion and Order in CSR-3873-A, DA 96-1231 (Dep. Chief, Cable Services Bur. rel. August 2, 1996) (denying Time Warner's request for stay). International Channel has yet to recover such full-time distribution six years later. Because Congress enacted must-carry into law and the Supreme Court upheld it as constitutional, the Programmers have had no alternative but to live with the resulting infringement of their rights and impairment of their commercial opportunities.

"Primary Video" Means What It Says.

There is no legal or public interest justification, however, for the Commission to reverse course now and extend must-carry to all "free" channels offered by broadcasters. The statutory language which the Commission interpreted has not changed, and no court has interpreted it differently. Faced with that language the Commission concluded that the statute granted must-carry rights only to the "primary video" signal of a broadcaster:

The term primary video, as found in Sections 614 and 615 of the Act, suggests that there is some video that is primary and some that is not. In this instance, we rely on the canon of statutory construction that effect must be given to every word of a statute and that no part of a provision will be read as superfluous. Here we must give effect to the word "primary." The dictionary definitions of "primary" are "First or highest in rank, quality, or importance," and "Being or standing first in a list, series or sequence." Based on the plain words of the Act, we conclude that, to the extent a television station is broadcasting more than a single video stream at a time, only one of such streams of each television signal is considered "primary."

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[I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to only such designated stream.

First Report & Order, 16 FCC Rcd 2598 (2001) at ¶¶ 54, 57.

In an attempt to rewrite the statutory language, various commenters have tried to ignore its plain meaning and twist the words to mean the opposite. For example, America's Public Television Stations ("APTS") claims that the word "video" is a "collective noun" modified by "primary." After this unsupported exercise in linguistic gymnastics, APTS claims that "[p]rimary video" therefore describes a collection of programming streams that may be

regarded as a unit because they are all available free, over the air.” APTS Ex Parte Submission regarding “Carriage of Multicast Digital Services Position of Public Television,” dated May 9, 2002, at 1. Surely this kind of nonsensical exercise, submitted in ex parte comments, cannot support a drastic reinterpretation of the must-carry statute by the Commission. Broadcasters are not seeking the retransmission of a jumbled “collection of programming streams.” They want mandatory distribution of separate programming services on separate channels with separate designations. For example, immediately after claiming that it is entitled to mandatory carriage of its “collective programming stream,” APTS claims that “[o]ther multicast service plans include a 24-hour children’s channel, coverage of state and local government proceedings, multicultural and foreign language services and other locally-oriented services.” Thus, APTS’s linguistic exercises bear no relationship to the reality of what broadcasters seek – mandatory carriage of multiple channels unrelated to their primary channel.

After considering the statutory language, its context, and legislative history, the Commission gave meaning to the term “primary” in the way compelled by common sense. Its interpretation is consistent with a string of decisions by federal and state courts similarly interpreting “primary” as people commonly understand the term and dictionaries define it. See Costle v. Pacific Legal Found., 445 U.S. 198, 201 (1980) noting that the EPA “defines ‘primary treatment’ as ‘the first stage in wastewater treatment’”; City of Ketchikan v. Cape Fox Corp., 85 F.3d 1381, 1384 (9<sup>th</sup> Cir. 1996) (citing the *Black’s Law Dictionary* and *Webster’s New World Dictionary* definitions of “primary” and holding that the word “primary” in the term “primary place of business” “connotes a single leading location,” and that, because the “focus of the phrase is the word ‘primary,’...a business may have only one ‘primary place’”); Compton v. Inland Steel Coal Co., 933 F. 2d 477, 482 (7<sup>th</sup> Cir. 1991) (relying on the *Webster’s Third New International Dictionary* definition of “primary” as “‘something that stands first in order, rank, or importance’”); and Hakala v. Atxam Corp., 753 P.2d 1144, 1148 n.4 (Alaska 1998) (relying on the *Black’s Law Dictionary* definition of “‘primary’ as ‘[f]irst; principal; chief; leading. First in order of time, or development, or intention’” and stating that “*in essence...there can only be one ‘primary anything’*” (emphasis added)).

There is no reason for the Commission to discard its prior statutory interpretation and reach the opposite conclusion. However, if the Commission were considering that course, with which we disagree, the Programmers respectfully submit that procedural fairness would require the Commission to propose its new conclusion, to explain the bases for its reversal and to solicit additional public comment regarding such proposal and its implementation. At this point, it would appear that any Commission decision necessarily would be founded upon the extensive ex parte comments submitted in this proceeding which may have escaped the scrutiny of many interested parties, as well as consumers.

The Public Interest Is Not Served by Guaranteeing a Return on Broadcasters’ Investment in Multicast Programming Services or Eliminating Programming Risks.

Although broadcasters argue that this reinterpretation and expansion of must-carry is somehow in the public interest, there is no factual basis in the record to support those claims. The programming services for which broadcasters seek mandatory carriage are

unknown. For example, in claiming that cable operators' exercise of their editorial discretion equates to discrimination against broadcasters, the National Association of Broadcasters ("NAB") provides the following generalized description of multicast services:

The consequences of this Commission action are severe. By giving cable operators control over the ability of a broadcaster to realize a return on investment in multiple program streams, the Commission has created a powerful disincentive for broadcasters to invest the huge sums needed to develop multiple streams of locally-oriented programming or innovative video services. As a result, cable subscribers and non-subscribers alike will be deprived of the full benefits that digital technology enables, including programming selected to reflect the tastes and needs of their local communities.

See NAB Ex Parte Submission regarding "A Constitutional Analysis of the 'Primary Video' Carriage Obligation: A Response to Professor Tribe," August 5, 2002, at 9. Thus, the NAB describes the programming to be multicast as "locally-oriented" or "innovative" which description could include almost any programming service. Although broadcasters continue to emphasize the opportunity to include local content, they have resisted any obligation to include such content on their primary channels and those programming services launched by multiple station owners generally have been conventional, national programming services.

As the NAB disclosed above, mandatory carriage is more about money rather than diversity or the survival of local broadcasting. Guaranteed distribution regardless of content or viewer demand is likely to guarantee the "return on investment in multiple programming streams" sought by the NAB. Likewise, APTS seeks to eliminate any risk in the selection of multicast channels through must-carry "by ensuring the survival of broadcast stations that decide that multicasting is the highest and best use of their spectrum." See APTS Ex Parte Submission August 12, 2002, at 7. The Programmers submit that commercial broadcasters should receive no greater guarantee of return on investment than the Programmers receive and that non-commercial broadcasters should face the same risks of viewer rejection and failure which they face.

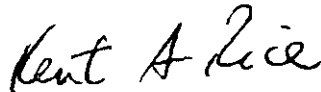
Broadcasters also suggest that, because six digital channels may require lesser bandwidth than a single analog channel, mandatory carriage is somehow justified. This argument presumes some form of entitlement beyond the primary over-the-air channel to which Congress accorded a legislative preference. If additional channel capacity becomes available with the transition to digital, the Programmers should be able to compete for distribution and viewership. There is no justification for guaranteeing the distribution of foreign language programming services launched by non-commercial broadcasters, as predicted by APTS, to the disadvantage of International Channel, the International Premium Networks, and Canales ñ. Likewise, entertainment and sports offerings by broadcasters should not disadvantage distribution of Starz Encore or Outdoor Channel. Such mandatory distribution would infringe the constitutional rights of the Programmers.

Finally, broadcasters claim that mandatory carriage of these unknown services will speed the digital transition. Again, there is nothing in the record to support this claim other than the broadcasters' repeated assertions. The digital transition will be driven by the creation of

than the broadcasters' repeated assertions. The digital transition will be driven by the creation of compelling programming – whether by the Programmers, broadcasters or others. Mandatory carriage to eliminate risks and ensure returns is likely to stall that transition.

In short, the Programmers seek only a fair opportunity to compete for distribution and viewers. The mandatory carriage of numerous broadcasters and the launch of multiple programming services furthered by retransmission consent agreements with the large multiple station owners have posed significant challenges which the Programmers largely have been able to overcome by developing desirable, cost-effective programming services. The statute does not authorize must-carry for still more channels, and the public interest does not support it.

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